No. 12966

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ESTHER WESTFALL,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
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INDEX

CASES CITED

STATUTES

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BRIEF OF APPELLANT

JURISDICTION

This action was brought by the Appellee pursuant to the Federal Tort Claims Act (Section 1346, Title 28, U.S.C., and Chapter 171 of Title 28, U.S.C.). The jurisdiction of this Court to review the decision of the district court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

The Appellee seeks to recover for an alleged injury sustained while a passenger on a bus operated by the United States Army.

On February 20, 1946, the Army authorities at Fort Lewis, Washington, sent a bus to Seattle, Washington, for the purpose of transporting some USO entertainers to Fort Lewis. The entertainment group consisted of young boys and girls between the ages of eleven and eighteen years who performed various dancing and musical acts. The Appellee was the mother of two of the girls and accompanied the entertainers as a chaperon (Tr. 54, 66, 69). The entertainers performed the services voluntarily, and there was no compensation to be paid to the entertainers. They performed their services for their own pleasure only (Tr. 53, 55, 64).

There were approximately 15 to 20 persons in the entertainment group and the bus would accommodate 25 to 30 people. The Appellee was riding on the seat immediately in the rear of the driver's seat. This seat was built to accommodate two individuals. The left side of the seat was next to the left wall of the bus while the right side of the seat was on the aisle. The driver's seat was approximately one foot in front of the right half of this double seat. In front

of the left half of the seat there was an empty space approximately 1 to 1½ feet wide and about 2 feet long running forward to the dashboard and front of the interior of the bus (Tr. 60, 61).

The evidence is in sharp dispute as to where the Appellee was seated. The Appellee weighed 256 pounds and claims that she was sitting on the left hand side of the seat facing towards the front (Tr. 35, 60).

The Appellant's evidence showed that there was a hand rail just forward of the seat upon which the Appellee was riding extending from the left hand wall of the bus towards the center of the bus, at about the height of the back of the seats, and that this hand rail connected with a vertical rail in about the middle of the bus (Tr. 108, 153). The Appellant's evidence further showed that the Appellee was seated on the right hand portion of the double seat immediately behind the driver with her back towards the left hand side of the bus and her feet towards the aisle (Tr. 109, 112, 134, 135, 141).

The evidence further showed that there was no arm rest at that portion of the double seat which was next to the aisle (Tr. 35).

The evidence is likewise in sharp dispute as to

the manner in which the alleged injuries occurred. The Appellee contends that the Appellant's driver approached a traffic signal at a speed of approximately 60 miles per hour, and that when the bus was approximately 50 feet from the traffic signal the same turned red and the driver applied the brakes, coming to a complete stop (Tr. 36). The Appellee claims that she was thrown to the floor of the bus into the vacant space between the driver's seat and the outside wall of the bus. The Appellee further claims that the incident took place within the city limits of the city of Tacoma (Tr. 35, 36).

The Appellant's evidence shows that the particular bus being used in this occasion was a new International K-7 (Tr. 103, 104, 119). This bus was equipped with a governor which would cut off the fuel supply when the bus reached a speed of 35 miles per hour (Tr. 106, 116, 117, 146 and Exhibit "N"). The governor was a sealed unit which could not be tampered with or altered without breaking the seal (Tr. 147). The driver inspected the bus prior to the commencement of the trip and found the governor to be intact and the seal unbroken (Tr. 104). Army regulations prescribe that the governor on such a vehicle be set for 35 miles per hour (Tr. 149 and Exhibit "O"). The maximum speed which the bus could attain without a governor was 45 to 48 miles (Tr. 151).

The Appellant's evidence further showed that the highway between Tacoma and Seattle is a 4-lane highway for the entire distance. Just south of the city of Tacoma the Appellant's driver moved to the left hand or center of the lane for south-bound traffic in order to pass a tractor which was stopped in the right hand lane (Tr. 110, 111). Before the driver could maneuver the bus back in the right hand lane, other traffic began passing the bus on the right hand side. As the driver was attempting to find an opening where he could move to the right hand lane, a vehicle coming from a side road from the driver's left, darted out across the northbound traffic lanes and made a left turn immediately in front of the bus heading south. At this time the bus driver was driving at approximately 20 to 25 miles per hour (Tr. 111, 137). The Appellant's driver applied his brakes to avoid a collision with this vehicle (Tr. 115). The bus did not come to a complete stop but only decelerated so as to avoid a collision with the other vehicle (Tr. 112, 123). The bus driver was aware that the Appellee was on the floor of the bus behind him, but before he could pull the bus off the highway and stop, she had gotten back onto her seat (Tr. 112, 113, 116). The Appellee did not fall all the way to the floor but maybe on one knee (Tr. 122). By the Ap-

pellee's own admission she could not see the ~~speed~~ freedom of the bus (Tr. 47).

The evidence is likewise in sharp dispute as to the Appellee's injuries. The Appellee contends she was 41 years of age at the time of the alleged injuries and that she twisted her back in the fall and that her full weight was thrown on her left ankle as the result of which she had a severe sprain of her left ankle and her back. The ~~Appellant~~ Appellee contends that her ankle and back have bothered her ever since the accident (Tr. 36). The Appellee admits that she was employed as a school teacher at the time of the accident and that on the next day, Thursday, February 21st, she went to work and worked the full day. February 22nd was a Friday and a holiday. The Appellee returned to work on Monday, February 25th, and worked the remainder of that week (Tr 48). After work, on February 21, 1946, the Appellee went to Dr. Seering for an examination. X-rays were taken and it was found that no bones were broken (Tr. 37, 73, 74, 81).

The evidence showed that when the Appellee went to Dr. Seering on February 21, 1946, that she did not complain of any back injury, but only complained of a sore ankle (Tr. 80, 81, and Exhibit "D"). The evidence further showed that women who

weigh in excess of 250 pounds frequently have sore backs and sore ankles (Tr. 82).

On March 8, 1949, the Appellee was examined by Dr. Lindahl, a doctor of her own choosing. Dr. Lindahl found both ankles swollen, but found that she had a normal back (Tr. 84, 85).

On December 11, 1950, the Appellee was examined by Dr. Sprecher, another doctor of the Appellee's own choosing, who found a very minimal amount of muscle spasms in the back, but no swelling in her ankle (Tr. 88, 89).

On October 3, 1950, Appellee was examined by Dr. McConville at the Appellant's request. Dr. McConville found no evidence of muscle spasms in the back, but on the contrary, found the Appellee could use her back within normal limits. The Appellee's ankles measured eleven inches equally (Tr. 127, 128, 129). Dr. McConville attributes the Appellee's pains in her back to poor posture (Tr. 127, 128).

At the time of the trial the Appellee weighed 175 pounds and X-rays taken by Dr. McConville showed no old or recent injuries in the ankles (Tr. 130).

The Appellant's evidence likewise showed that the superintendent of the school at which the Appellee was teaching on February 21, 25, 26, 27, 28 and

March 1, 1946, was not aware of the Appellee's having received any injury and did not notice any limp or other signs of physical pain or injury (Tr. 93).

The superintendent of the school at which the Appellee taught between November 1, 1948 and June of 1949, did not notice any limping by the Appellee or any other manifestations of any physical disability (Tr. 95).

Further, in June, 1949, the Appellee made written application for a job as a school teacher with the Seattle Public Schools in which she stated that she had no physical disability (Tr. 97, 98, and Exhibit "E").

The extent of the Appellee's loss of earnings is likewise in sharp dispute. The Appellee contends that her income has been lowered by reason of her injuries (Tr. 51). During the school year, 1945-1946 the Appellee earned $800.50 (Tr. 100, 101). However, by the Appellee's own testimony, it was shown that she went to work at the Boeing Airplane Company as a key-punch operator in the fall of 1946 and worked until the latter part of 1947, during which time she worked eight hours a day and earned $40 to $45 per week, at an hourly rate of $1.10 per hour (Tr. 39, 49). The Appellee further admitted that after working at Boeings she went to work selling

Stanley Home products, which job she retained until sometime in the latter part of 1948 (Tr. 40, 50). Stanley Home products are cleaning and preserving materials for household use. The Appellee's job consisted in making demonstrations of such products as floor wax, furniture polish, etc. At this job the Appellee earned $150 per month. Appellee further admitted that she obtained a job as a school teacher beginning November 1, 1948, and continued in that employment until June of 1949, earning $212 per month (Tr. 41). After this teaching job the Appellee went to school for four weeks and received a B.A. degree (Tr. 43). Thereafter the Appellee worked as a saleswoman for Real Silk Hosiery, earning approximately $150 per month. This job consisted of making house to house canvasses (Tr. 53).

The evidence as to the special damages was as follows:

The Appellee had a health policy with the Medical Security Clinic for which she paid a monthly premium of $3.00. Dr. Seering's bill was $114, but the same was paid by the Medical Security Clinic (Tr. 45). Appellee's policy contained a subrogation agreement whereby the Medical Security Clinic had the right to recover against third parties for the medical expenses arising out of any injury where a

third party would be liable for the same (Tr. 76, 77, 78).

Dr. Sprecher testified that the costs of his services were $15.00, but that the sole purpose in his examining the Appellee was for the purpose of testifying at the trial (Tr. 91).

Dr. Lindahl testified that the cost of his services was $20.00, but that he, too, examined the Appellee solely for the purpose of testifying at the trial (Tr. 87).

The Appellee testified that she expended approximately $150 for alcohol, aspirin and alka-seltzer because of her injuries (Tr. 44).

Upon this testimony the trial judge allowed recovery of $250.00 for special damages.

At the conclusion of the evidence the trial court announced its decision without allowing counsel for either side to make any argument whatever (Tr. 165). In finding liability on behalf of Appellant, the trial court took the evidence most strongly in favor of the Appellee without requiring that the Appellee prove her case by a preponderance of the evidence (Tr. 167).

QUESTIONS RAISED

1. Does the Appellee have a right to sue the United States of America in the State of Washington, bringing her action over four years after the action arose when the statute of limitations for such an action in the State of Washington is three years?

2. Is the Appellee's action barred because of laches?

3. Is the Appellee barred from recovery because of the guest statute of the State of Washington?

4. Is the Appellee's evidence sufficient to allow recovery of the $250.00 as special damages?

5. Is the Appellee entitled to recover for the services of Dr. Seering when she did not pay for such services but when the same were paid for by her insurance company?

6. Is the Appellee entitled to recover for the services of doctors who examined her solely for the purpose of testifying at the trial?

7. Is the Appellee's testimony that she spent $150.00 for drugs sufficient for the recovery of said amount?

8. Are the Appellee's injuries sufficient to sus-

tain an award of general damages in the sum of $7500.00?

9. Was the Appellant's driver guilty of negligence?

10. Was the Appellee guilty of contributory negligence?

11. Does a litigant have a right to argue his case before the court's decision is rendered?

12. Is a plaintiff required to prove his case by a preponderance of the evidence?

13. May reports rendered by a witness in the regular course of business be submitted in evidence?

SPECIFICATIONS OF ERROR

1. The Court erred in failing to dismiss Appellee's complaint for the reason that the same was barred by the Statute of Limitations of the State of Washington.

2. The Court erred in failing to find that the Appellee's cause of action was barred because of laches.

3. The Court erred in failing to apply the Guest Statute of the State of Washington which denies the Appellee the right to recover.

4. The court erred in allowing the Appellee $250.00 as special damages.

5. The general damages in the sum of $7500 allowed by the Court were excessive in view of the injuries alleged to have been received by the Appellee.

6. The evidence is insufficient for the Court to find the Appellant's driver guilty of negligence.

7. The Court erred in failing to find that the Appellee was guilty of contributory negligence.

8. The Court erred and abused its discretion in failing and refusing to allow counsel to argue the facts of the case to the conclusion of the evidence.

9. The Court erred in failing to require the Appellee to prove her case by a preponderance of the evidence and in taking the Appellee's evidence in its most favorable light.

10. The Court erred in refusing to allow Mr. Barton to testify as to reports he had made and submitted dealing with Appellee's physical condition at a time when his knowledge of such condition was fresh in his memory.

Argument On Specification of Error No. I

Summary

The Federal Tort Claims Act allows recovery only in such cases where the laws of the state in which the act or omission occur would allow recovery. The Statute of Limitations in the State of Washington is three years for the type of action brought by the Appellee, a private person in the State of Washington would not be liable to the Appellee in this case.

Argument

The Appellee claims she was injured on February 20, 1946. The Appellee commenced this action April 21, 1950, or four years and two months after the cause of action arose.

Section 1346 of Title 28, U. S. Code provides that the United States shall be liable for torts in such cases "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occur." Section 155 of Remington's Revised Statutes for the State of Washington states in part as follows:

> "Actions can only be commenced within the periods hereinafter prescribed after the cause of action shall have accrued, * * *."

Section 159 of Remington's Revised Statutes for

the State of Washington states in part as follows:

> "Within three years: * * * 2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; * * *."

If the United States of America were a private person in this instance the Appellee could not have commenced her action after February 20, 1949. The Appellee could not have commenced an action against the Appellant's driver, personally, after February 20, 1949. Since the United States can only be liable because it is the employer of the driver of the bus, the United States can not be liable if the driver of the bus is not liable.

Section 267 of Title 28, U. S. Code, states in part as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

When Congress amended Section 2401 of Title 28, U. S. Code, in 1949, extending the statute of limitations for one year on tort claims, there was no indication that Congress ever intended to extend the liability of the United States beyond that of a private person under like or similar circumstances.

Argument On Specification of Error No. II

Summary

The Appellee and her counsel knew of the cause of action and intended to bring the action at least as early as June of 1948. However, the action was not commenced until four days before the statute of limitations of the Federal Court expired on April 25, 1950. The Appellant has been seriously prejudiced by such unwarranted and unexplained delay.

Argument

The Appellee's action is further barred by reason of laches. If the state statute of limitations did not otherwise bar the Appellee from commencing her action, the Appellee could not have begun an action against the United States after April 25, 1950 (Sec. 2401, Title 28, U. S. Code). The action was commenced just four days before this date.

It is the Appellant's contention that where a party commences an action after the state statute of limitations has expired, the same is barred by the doctrine of laches even though the statute of limitations of the forum in which the action is brought does not so bar the commencement of the action. The Court of Appeals for the Ninth Circuit ruled squarely upon this point in *Westfall Larson & Company v. Allman-*

Hubble Tugboat Company, 73 F. (2d), 200. In that case an action was begun in admiralty after the three year statute of limitations prescribed by the laws of the State of Washington had expired. The same statute of limitations, that is, Section 159 of Remington's Revised Statutes, was involved in that case as here. The action was brought by a Washington corporation against a vessel whose owner resided in Norway and the amount involved exceeded $3000. On the appeal two questions were raised: (1) Was the claim barred by virtue of the doctrine of laches and (2) was the tort a maritime tort within admiralty jurisdiction. The Court of Appeals for the Ninth Circuit ruled that the claimant could not recover because of the doctrine of laches, stating:

> "The law is well settled in that, in the absence of a showing of such 'exceptional circumstances' a court of admiralty in determining the question of laches will be governed 'by analogy' by the state statute of limitations covering actions of the nature disclosed by the libel."

The Court also held that the tort was not within Admiralty jurisdiction. Had this latter point been the only objectional feature in the case, the Court of Appeals would undoubtedly have considered the matter as having been tried as a civil cause, since there was jurisdiction for the Federal Court to hear the matter as a civil cause. There was diversity of citi-

zenship and the amount in controversy was in excess of $3000. However, since the Court of Appeals for the Ninth Circuit did not remand the Westfall Larson case to the district court to be considered as a civil cause, it is obvious that the doctrine of laches constitutes a valid defense in a civil action as well as in admiralty.

In the case of *Twin Harbor Stevedoring & Tug Company vs. Marshal*, 103 F. (2d), 513, and *Kobilkin v. Pillsbury*, 103 F. (2d), 667, the Court directed that since the action was started on the civil side rather than the admiralty side, that the district court should treat the petition as a libel and proceed with the action.

The doctrine of laches is considered an adequate defense by the courts of the State of Washington. In *Keyes v. Tacoma*, 12 Wash. (2d), 54, the Supreme Court of the State of Washington states as follows:

> "In order to bar recovery because of laches, there must appear, in addition to the lapse of time, some circumstances from which the defendant or some other person, may be prejudiced; or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if recovery is allowed."

The obvious purpose of both the statute of limitations and the doctrine of laches is to bar stale claims.

The doctrine of laches is based upon some injury or prejudice to the defending party by reason of the plaintiff having delayed so long in bringing the action. The evidence in this case clearly shows that the Appellant was prejudiced in preparing a defense to this action because of the Appellee's failure to bring the action until four years and two months after the action arose.

The evidence shows that even with the facilities of the Federal Bureau of Investigation the Appellant was unable to locate several of the witnesses to this action. The evidence further shows that the Government was unable to locate the trip tickets issued for this particular trip. Had the action been brought at a time when it should have been, the records would have probably been available to the Appellant. Also, had the action been commenced within a reasonable time, the Appellant would undoubtedly have had the benefit of fresher memories and probably been able to locate additional witnesses. In addition to these facts it should also be noted that the Appellee was aware of her right to bring an action and intended to bring such action as early as June 21, 1948. Exhibit "D" (Tr. 80) is a letter from the Appellee's physician to her attorney, bearing that date, wherein Dr. Seering sets out the results of his physical ex-

amination. Despite such knowledge of the existence of an action in 1948, the Appellee did not bring her action until two years later.

It should be further noted that at the time of the alleged injury the Appellee weighed 256 pounds. On March 8, 1949, when Dr. Lindahl examined the Appellee she still weighed 253 pounds. By the time the time the Appellee brought her action her weight had been reduced to approximately 175 pounds. Had the Appellee brought her action in 1948, the Appellant's physician could have made a far better diagnosis as to the cause of her injury, that is, whether her alleged pain and suffering were real and if so whether the cause was excessive weight or some other causes. By virtue of the Appellee's unwarranted and unexplained delay in bringing this action, the Appellant has been deprived of the right to examine the physical evidence.

It is a matter of common knowledge that during the year of 1946 the U. S. Army was in the process of demobilizing the several million men. This demobilization took place in a relatively short period of time. Once the personnel were demobilized, the task of tracing such witnesses who might have known something about this incident became difficult. The task of finding those individuals after four years became well nigh impossible.

From the undisputed evidence in this case, it is the Appellant's contention that the only logical conclusion that can be drawn is that the Appellee intentionally delayed bringing the action until it would be impossible for the Appellant to prepare a defense. The doctrine announced in the Westfall Larson case, supra, should be applied to this case, that is, that when the state statute of limitations bars an action in the state courts the doctrine of laches bars the same action when brought in the Federal courts.

Argument On Specification of Error No. III

Summary

The Army authorities invited the group to come to Fort Lewis. The group accepted the invitation. There was no payment to be made of any kind by either the Army or the group. The group went on the trip for its own pleasure. No one was bound to go on the trip. This is a host-guest relationship for which the laws of the State of Washington bar recovery.

Argument

Guest Statute—Section 6360-121 of Remington's Revised Statutes of Washington states as follows:

> "No person transported by the owner or operator of a motor vehicle as an *invited guest* or licensee,

> *without payment for such transportation*, shall have cause of action for damages against such owner or operator for injuries, death, or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator: Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while the same is being demonstrated to a prospective purchaser." (Italics supplied).

The Court's attention is particularly invited to the italics portion of the above statute which distinguishes this guest statute from most guest statutes in some other states.

In *Syverson v. Berg*, 194 Wash. 86, the defendant, a college boy, desired to take the plaintiff's daughter to a dance in another city where the daughter would have to stay over night. The plaintiff's mother at first refused to permit her daughter to make the trip but finally consented on the condition that she go along as a *chaperon*. The court held that the mother was a guest within the meaning of Section 6360-121 of the Washington statutes and could not recover against the defendant for an injury she sustained while riding in the defendant's automobile. The following quotation from the decision is pertinent to the issues in this case:

> "This was a purely social automobile trip. *It was not taken in expectation of material gain.* To hold that a mother acting as a *chaperon* to her

> daughter for the sake of propriety is not within the status of an invited guest — there is no evidence or claim of any monetary consideration either accruing or promised to the appellant as a result of this trip — would so misinterpret the statute as to divest it of force and defeat the clearly declared intention of the legislature to deny recovery, as against the owner or operator of the automobile, to a guest or licensee where no business advantage or material consideration accrued to the host in the transportation resulting in the injury." (Italics supplied).

All of the testimony in the case at hand clearly shows that the Army extended an *invitation* to this group of children to come to Fort Lewis. All of the evidence shows that the reason the children went to Fort Lewis was for their own pleasure. Every witness interrogated on this subject testified that she enjoyed making the trips and got a great deal of pleasure out of them and further that they were under no obligation whatever to make any trip. There was no money or payment of any kind involved. Either before or after the entertainment, if time permitted, a party was provided where refreshments were served and a social gathering took place. The only possible relationship that is shown by the evidence is that of host-guest. As stated in the Syverson case, the trip was not taken in expectation of material gain nor was there any material benefit conferred upon the driver's master.

In *Taylor v. Taug*, 17 Wash. (2d) 533, the following quotation defining the host-guest relationship is of material assistance:

> "The relationship of host and guest in its inception carries with it the concept of a *gratuitous offer of service by a host, or a request for service on the part of a guest and an acceptance, followed by an overt act.* While it cannot be held that the relationship is founded upon contract, still in its very nature it must be based upon a meeting of the minds of the host and the intended guest, followed by an act which manifests an intent to proceed with the journey."

The above definition describes exactly what occurred in the case at hand.

It is anticipated that opposing counsel may argue that the relationship between the Government and the Appellee in this action is that of joint adventurers. In the case of *Finn v. Drtina*, 30 Wn. (2d) 814, at pages 825 and 826, the Supreme Court of the State of Washington defines joint-adventurers as follows:

> "In each of the cases of *Hurley v. Spokane*, *Martin v. Puget Sound Electric R.*, and *Shirley v. American Automobile Ins. Co., supra*, the action was not brought by one member of a joint enterprise against another member thereof, but was brought by one who, under the facts, was held to be a joint adventurer, against an independent third party. The three cases last referred to, together with many other prior cases, are cited and discussed in the case of *Carboneau*

v. Peterson, 1 Wn. (2d) 347, 95 P. (2d) 1043. The opinion states:

'The analysis of the foregoing twenty-seven cases leads to at least one irrefutable conclusion, namely, that the case of *Rosenstrom v. North Bend Stage Line*, *supra*, (154 Wash. 57, 280 Pac. 923) has pronounced, and is, the law in this state with respect to joint adventures wherein the use of automobiles is involved. Although, from what appears in the opinion in some of the cases, it may be difficult to demonstrate that the rule has at all times been consistently applied in its full extent and vigor, there can be no doubt of the prevalence and fixity of the rule itself. Its recurrent citation has made it a rubric upon this branch of the law.

'Briefly stated, a joint adventure arises out of, and must have its origin in, *a contract*, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common purpose and in the objects or purposes of which they have a community of interest, and, further, a contract in which each of the parties has an equal right to a voice in the manner of its performance and an equal right of control over the agencies used in the performance. Thus, we note (1) a contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control.

'The *sine qua non* of the relationship is a *contract*, whether it be express or implied. As a legal concept, a joint adventure is not a status *created or imposed by law*, but is a relationship voluntarily assumed and arising wholly *ex contractu*. The essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a

> breach of contract. A mere agreement, or concord of minds, to accompany one another upon an excursion, but without an intent to enter into mutually binding obligations, is not sufficient to create the relationship of joint adventure. (Italics ours).'
>
> Whatever may be said in regard to the cases decided prior to the *Carboneau case, supra*, it is now firmly established that the rules announced in the *Carboneau case* are now the rules to be applied in determining whether or not in a given case the relationship of joint adventurer exists."

It will thus be seen from the above quotation that one of the essential elements of the relationship of joint adventurers is that there be a contract that binds the parties. The evidence in this case clearly shows there was no binding contract. The relationship between the Government and the Appellee was entirely voluntary, there being no compulsion on either party to carry out the program.

The case of *Justice v. Lavagetto*, 9 Wn. (2d) 77, might also be of interest to the Court in pointing out that even an employer-employee relationship has been considered a host-guest relationship under the Washington Decisions. On page 80 the court stated as follows:

> "Respondent and the other two persons who were riding with Mr. Lewis in his truck were employed by Mr. Lewis, and boarded at his home. On the evening in question, Mr. Lewis was taking his three employees and boarders home, purely as

> an accommodation to them, and we agree with the trial court that, at the time of the accident, respondent was a guest in Mr. Lewis' truck."

The Court's attention is also invited to the decisions rendered by the United States Supreme Court on December 4, 1950, the same being Nos. 29 and 31 of the October term, the first case being entitled *Feres v. United States*, 340 U.S. 135. These three cases were brought by members of the armed services against the United States for torts arising out of the negligence of military authorities. In the *Feres case*, the executor of the deceased soldier brought the action to recover for the wrongful death of the soldier caused by the negligence of his superior officers in quartering the soldiers in a barracks known to be unsafe because of a defective heating plant.

In the *Jefferson case* the plaintiff's action was based on the negligence of Army doctors in leaving a towel in his abdomen during an operation.

In the *Griggs case*, the action was based on wrongful death arising from the negligence of Army surgeons.

It will be noted that in all three of these cases, had the relationship of the plaintiff been that of employee-employer or doctor-patient, a cause of action would have existed. However, by virtue of the fact

that the plaintiffs in all three cases were members of the armed services at the time of the tort, the Supreme Court decided that there was no liability. The basis of this reasoning is that it was not the intention of Congress in passing the Federal Tort Claims Act to create any new type of tort. Further, that the tort claims act allows recovery only where a private individual would be liable. The Supreme Court stated as follows:

> "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving. Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Governments vests in echelons of command. The nearest parallel, even if we were to treat 'private individual' as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us, and we know of no state which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case. It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship,

there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

From this quotation it is obvious that the burden rests upon the Appellee to prove that the Government would be liable if it were a private individual, under the circumstances as shown by the evidence.

It is, therefore, the Appellee's burden to show to this court some case where the plaintiff would have a right of action where she is injured while chaperoning her daughter and other children on a trip which involved the purpose as set out in the evidence in this case. The defendant has made a search of the authorities and can find no case where such liability has ever existed. Unless the plaintiff can produce such authorities, no liability exists according to the decision in the *Feres case.*

Argument On Specification of Error No. IV

Summary

The evidence adduced on special damages is wholly inadequate, the same consisting of doctor's services paid for by an insurance company, doctor's services who examined the Appellee solely for the purpose of testifying and estimates of the amounts spent by the Appellee for aspirin, alcohol and the like.

Argument

The trial court allowed the Appellee special damages in the sum of $250. The evidence adduced at the trial as to special damages consisted of four items as follows:

1. Dr. Seering's services.....	$114.00
2. Dr. Lindahl's services.....	20.00
3. Dr. Sprecher's services.....	15.00
4. Purchase of aspirin, alcohol and alka-seltzer by the Appellee estimated at..	150.00
	$299.00

It is the Appellant's contention that the evidence as to each of these items of expense is not sufficient to support a judgment for special damages.

The Appellee had a policy with the Medical Security Clinic upon which she paid a premium of $3.00 per month. This policy entitled the Appellee to receive

medical services including the services of Dr. Seering (Tr. 77, 78). The Appellee did not actually pay for Dr. Seering's services. Under the terms of the Appellee's policy the Medical Security Clinic had the right to take recourse under a subrogation clause against any third party who might be liable for Appellee's injuries.

The Supreme Court of the United States in *United States v. Aetna Casualty Company*, 338 U.S., 366, ruled squarely upon this point in stating:

> "If the subrogee has paid the entire loss suffered by the insured, it is the only real party in interest and must sue in its own name."

In this case the subrogee, the Medical Security Clinic, has paid for all of the services of Dr. Seering and therefore if a recovery is to be allowed for Dr. Seering's services the subrogee must be a party to the lawsuit. Since the subrogee is not a party to the lawsuit, the Appellee can not recover the $114.00 for Dr. Seering's services, which she never paid. The Medical Security Clinic owns this cause of action and can institute an action against the Appellant to recover this amount in its own name. The purpose of Rule 17a is to avoid just such double payment as would occur here if the present judgment were allowed to stand and the subrogee elected to sue in its own name.

As to the services of Dr. Lindahl and Dr. Sprecher, the evidence clearly shows that both of these doctors examined the Appellee at the request of her counsel solely for the purpose of presenting their testimony in this trial (Tr. 87, 91, 92). The Appellee has no greater right to recover for the services of these doctors than she would have to recover for the services of a private investigator or counsel fees or any other services for which she might have had expenses in the preparation of her case for trial.

With regards to the Appellee's estimate of her expenses for aspirin, alka-seltzer and alcohol, there is no evidence whatever that such items were prescribed by any doctor or that such items were necessary as the result of the Appellee's alleged injury.

The following quotation from the case of *Carr v. Martin*, 135 Wn. Decisions 710, is controlling so far as this action is concerned:

> "However, in *Torgeson v. Hanford*, 79 Wash. 56, 139, Pac. 648; *Richardson & Holland v. Owen*, 148 Wash. 583, 269 Pac. 838; *Cole v. Schaub*, 164 Wash. 162, 2 P. (2d) 669, 7 P. (2d) 1119; *Hutteball v. Montgomery*, 187 Wash. 516, 60 P. (2d) 679, we definitely decided that proof of amounts of indebtedness incurred or paid for such services as are rendered by physicians, nurses, and hospitals are not sufficient upon which to base a verdict or a judgment, but there must be evidence of their reasonable value. The

court should not have submitted the claims for special damages to the jury."

In view of the total lack of competent evidence to support the Court's awarding special damages in the sum of $250.00, it was error for the Court to make such an award and that portion of the damages should not be allowed to stand.

Argument On Specification of Error No. V

Summary

The most the Appellee received was a sprained ankle, which was not a permanent injury. The Appellee made no complaint to her doctor the day after the accident about any back injury. The Appellee's injuries were so slight they were not noticed the next day by her supervisors at her place of employment. The Appellee should not be entitled to more than $1000 in any event.

Argument

It is the Appellant's contention that the award of $7500.00 as damages is grossly excessive. At most, all the Appellee suffered was a sprained ankle. This sprain was so slight that the Appellee did not have sufficient limp on the following day for her employer to notice it (Tr. 95, 96, 97). The Appellee did not

miss one day's work as the result of her alleged injury (Tr. 101, Exhibit "F"). When the Appellee went to Dr. Seering after work on the afternoon of the day following the alleged injury, she did not complain of any back injury at that time. (Exhibit "D", Tr. 80, 81). At a later time the Appellee did complain of her back. Obviously, if the Appellee had any injury to her back she sustained such injury at some time and place other than at the time alleged in this action. Apparently the Appellee injures her back quite often. It will be noted that when Dr. Lindahl examined the Appellee on March 8, 1949, her back was normal and the doctor could find no tenderness during his examination (Tr. 85). However, when Dr. Sprecher examined the Appellee on December 11, 1950, he found a very minimal amount of muscle spasm, a minimal amount of limitation and motion and considerable tenderness in the Appellee's back. It is quite understandable that a woman weighing 250 pounds demonstrating floor wax and floor polishes would strain her back on occasions. In all probability this has occurred on several occasions throughout the years. However, there is no showing whatever that the Appellee injured her back at the time and place alleged in her complaint. Dr. McConville gave a very good explanation as to one of the reasons for the Appellee's sore back. Dr. McConville found

that the Appellee had a poor posture which would result in the pains of which she complained. Dr. McConville further found no evidence of muscle spasm, that the Appellee was able to bend forward within six inches of the floor, that her lateral bending and rotation of the spine were within the normal limits, that she was able to stand on either foot and raise up on the toes, that she was able to assume a full squat and to recover without difficulty, that she was able to stand in a straddle position and sway her hips from side to side and rotate them without difficulty, that in lying down in a prone position she was able to contract the muscles of her spine equally and that she could raise both legs from the table without difficulty, and that she could raise her chest and legs from the table without difficulty. Not one of the Appellee's doctors refuted this testimony. Certainly no one with an injured back or ankle could perform such acrobatic feats as this.

As to the Appellee's ankle injury, it will be noted that the Appellee had swelling in both ankles when examined by Dr. Lindahl. Undoubtedly, a woman weighing 250 pounds would have swollen and sore ankles every time she did any appreciable amount of walking.

Under such circumstances, as the evidence shows

in this case to have existed, the Appellee suffered no more than a sprained ankle. She should not be entitled to recover more than $1000 general damages if there is liability upon the Appellant.

With regards to the Appellee's complaint that her ankle and back have bothered her continuously since the alleged accident, it should be noted that in the Appellee's application for employment with the Seattle Public Schools filed in June, 1949, (Exhibit "E") the Appellee stated that she had no physical disability. If the Appellee has no physical disability when she seeks employment, then she has no disability for which she is entitled to recover in this lawsuit.

Argument On Specifications of Error Nos. VI and VII

Summary

The statements of the Appellee as to how the accident occurred clearly show that there was no negligence on the part of the driver. If the bus stopped in 50 feet the bus could not have been traveling more than 25 miles per hour. The Appellee, weighing 256 pounds, would have been the last passenger on the bus to have been thrown from her seat if she had been seated in a normal position and not guilty of contributory negligence.

Argument

It is the Appellant's contention that there is insufficient evidence for the Court to find that the Appellant's driver was negligent, and on the contrary there is an abundance of evidence to support the Appellant's contention that the Appellee was guilty of contributory negligence. The evidence will be discussed herein as though this Court were making the findings of fact. The Appellant considers that this is proper in this case since the trial court did not allow any argument whatever and therefore was not enlightened as to the contentions of the Appellant and the inferences to be drawn from the evidence.

According to the Appellee's version of the incident, the Appellant's driver approached a green traffic signal at a speed of 60 miles per hour, and when 50 feet from the traffic signal the same turned red and the driver applied the brakes, bringing the bus to a stop. Since the Appellee has had four years within which to prepare her case, and this evidence was elicited by her own counsel, the Court must take these facts at their face value as being the evidence which the Appellee wants the Court to believe.

If the traffic signal turned from green to red when the bus was 50 feet from the intersection, the driver would have to move his foot from the acceler-

ator to the brake pedal before any braking action could take place. Normally a driver can not accomplish this feat in less than ¼ of a second, but for the sake of argument let us assume that the driver could react and move his foot from the accelerator to the brake pedal in 1/10th of a second. During this 1/10th of a second the bus would travel 8.8 feet at 60 miles per hour. It is a matter of common knowledge that 60 miles per hour is the equivalent of 88 feet per second. This would leave 41.2 feet within which the bus came to a stop or in other words, decelerated from 88 feet per second to 0 feet per second. To determine the time within which the bus decelerated from 60 miles per hour to a standstill, we should determine the average velocity during deceleration, which in this case would be 30 miles per hour, or 44 feet per second, and divide that figure into the distance traveled. This gives us 412/440 seconds, or slightly less than 1 second. During this time the Appellee's body had a forward momentum of 88 feet per second. It is obvious, therefore, that the Appellee's body would be violently thrown forward as the result of such braking action, causing her body to strike the dashboard and front of the bus rather than throwing her to the floor. The Appellee testified that the front of the bus was only 2 feet forward of her seat. The Appellee's body would travel this 2 feet

in something less than 1/40th of a second. It would take the Appellee's body one fourth of a second, or 10 times that space of time to fall the one foot from her seat to the floor. It is obvious, therefore, that if the accident occurred in the manner in which the Appellee describes, her body would have been plastered against the front of the bus and her primary injuries would be a fractured skull and possibly several fractured ribs and arms.

Most of the other passengers were children between the ages of 11 and 18. On an average these children would not weigh more than 125 pounds. One of the forces which would tend to hold a passenger to his seat is the friction between the passenger's body and the seat itself. The greater the passenger's weight, the greater the friction, and consequently the greater the force holding the passenger to the seat. The Appellee, weighing approximately twice as much as any other passenger, would have twice the friction between her body and the seat, holding her to her seat. There is no evidence whatever of any other passenger being thrown from his seat. Since the Appellee was the only person thrown from her seat, there must have been some reason for that fact.

The second force which would tend to keep a passenger on her seat is the force exerted by the lower

limbs working against the inertia of the body. If the Appellee were sitting in a normal position with her feet on the floor and facing towards the front, the force exerted by her lower limbs should be approximately equal to the force of the strength exerted by the other passengers in proportion to their weights. If the Appellee's limbs were strong enough to support her 256 pounds of weight in walking, they should be equally strong enough to retard her forward motion, when the bus decelerated, to the same extent as the legs of the children would retard their forward motion. Since the Appellee was moved from her seat, it is obvious then that she did not have her feet on the floor in front of her so as to exert the same force to retard her forward motion as was exerted by the other passengers. The Appellant's testimony showed that the Appellee was sitting sidewise in her seat talking to the other passengers in the rear of the bus. Sitting in this position the Appellee would not have her feet and legs in a position to retard her forward motion. Also, the Appellee would in all probability not have as much of her body in contact with the seat in this position as she would have if she were sitting in a normal position, and consequently the friction between her body and the seat would be diminished. It is under these circumstances and these circumstances only, that the Ap-

pellee could possibly slide to the floor of the bus instead of being thrown against the dashboard and front of the bus, and even then only if the deceleration were moderate.

Neither the Appellant nor any other operator of a motor vehicle can give its passengers an absolute guarantee that the vehicle will not be required to decelerate rapidly in cases of emergency while traveling upon a highway. A passenger must expect that a bus will be required to decelerate rapidly on occasions. The seats provided on a bus, if used properly by the passengers, will give them a means of protecting themselves from injury when such deceleration occurs. However, if a passenger, such as the Appellee, chooses to use the seat in some abnormal manner so as not to be able to brace themselves in the event of sudden deceleration, then that passenger is guilty of contributory negligence, and accepts the risk of what might happen.

It should be further noted that the space within which the Appellee claimed she fell was approximately 2 feet long and 1½ feet wide. The Appellee admits she weighed 256 pounds. The Court is entitled to take judicial notice that a woman of this size would have extreme difficulty in fitting into a space this small. If the Appellee were thrown into such a small

space her injuries would be far greater and of a much different nature than those complained of by the Appellee.

It should be further noted that the Appellee claims her entire weight was thrown on her left ankle and that her back was twisted. If the Appellee had been sitting as she claimed, facing toward the front of the bus with her feet on the floor, there would have been no occasion for her entire weight to be thrown on one ankle nor would there have been any twisting motion. The only way there could have been such a twisting motion is for the Appellee to have been sitting sidewise in her seat with her right leg extending into the aisle and her left leg in front of the seat. This would have been a normal position for a person to assume when talking to persons in the rear of the bus. Such a position invites disaster regardless of how careful a driver of a bus might be. Under such circumstances the Appellee was most certainly guilty of contributory negligence, which, under the laws of the State of Washington, completely bars her from any recovery whatever.

The driver of the Appellant's bus was required to stop when traffic signals turned from green to red. There can be no negligence imputed to the Appellant's driver for stopping at a red traffic signal.

Therefore, the only possible negligence which the Appellee can claim is that of excessive speed. Obviously no braking system has ever been contrived which would stop a bus in 41.2 feet at a speed of 60 miles per hour. If the accident occurred as the Appellee claims, the maximum speed which the bus could have been traveling is somewhere in the vicinity of 20 to 25 miles per hour. No bus driver could possibly stop a bus in 50 feet if he were traveling more than that speed. There is certainly no negligence in traveling at a rate of 20 to 25 miles per hour.

It should be further noted that Army regulations require such buses to be equipped with a governor limiting the speed to 35 miles per hour. There was an abundance of testimony to the effect that this bus was equipped with such a governor and that it was operating properly. The Appellee admits she could not see the speedometer, therefore her statements as the speed of the bus are only estimates and can not stand in the face of the Appellant's testimony that the bus could not in any event have exceeded a speed of 35 miles per hour.

It is true that this Court does not have the benefit of hearing the witnesses and observe their demeanor on the stand. However, from the undisputed facts this Court should determine from the evidence that the

only conclusion which can be drawn from all the evidence is that the bus driver was not guilty of negligence and that the Appellee was guilty of contributory negligence. Since the trial judge did not have the benefit of the argument heretofore set out, this Court is in a better position than the trial court to determine the truth of what actually happened.

Argument On Specifications of Error Nos. VIII and IX

Summary

The basic requirements of a trial demand that counsel have an opportunity to make an argument to the fact finding tribunal so as to point the inconsistencies of the evidence and the conclusions which should be drawn therefrom. The trial judge having denied counsel this opportunity, has denied the Appellant a fair trial.

Argument

It is the Appellant's contention that since the trial court did not allow any argument whatever, that no trial has in fact been had, and that therefore the Appellant is entitled to have this Court remand this action to the district court for a new trial.

At the conclusion of all of the evidence the trial court promptly announced its decision finding that

the Appellant's driver was guilty of negligence and that the Appellee was free from contributory negligence. No opportunity was ever given counsel on either side to make any argument whatever (Tr. 165).

It will be further noted that in making such finding the trial court considered the evidence in a light most favorable to the Appellee rather than requiring the Appellee to prove her case by a preponderance of the evidence. In other words the Court presumed the Appellant was liable until proven otherwise. It is true that an appellant court should normally consider the evidence in a light most favorable to the prevailing party, but a trial judge, on the other hand, should require a plaintiff to prove its case by a preponderance of the evidence.

As the following authorities clearly show, the argument is an essential part of a trial. If no argument has been allowed, then no trial has been had.

The following language quoted from *Wilson v. Federal Communications Commission*, 170 F. (2d) 793, at page 805, supports this contention:

> "The due process guarantee of hearing draws no distinction between questions of law and questions of fact. Due process requires not only opportunity for the presentation of evidence and the cross-examination of witnesses but also op-

portunity for *argument. Londoner v. Denver*, 1908, 210 U.S. 373, 28 S.Ct. 708, 52 L. Ed. 1103; *Morgan v. United States*, 1938, 304, U.S. 1, 18, 58 S.Ct. 773, 999, 82 L. Ed. 1129; *Erie R. Co. v. Paterson*, 1910, 79 N.J.L. 512, 76 A. 1065. As said in *Londoner v. Denver*, where a state legislature committed the administration of a tax to a local board which enacted an ordinance of assessment allowing landowners an opportunity to file complaints and objections but no opportunity to be heard thereon:

'If it is enough that under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations *by argument* however brief, and if need be, by proof, however informal. *Pittsburg &c. Railway Co. v. Backus*, 154 U.S. 421, 426 [14 S.Ct. 1114, 38 L.Ed. 1031]; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 171 [17 S.Ct. 56, 41 L. Ed. 369] et seq. * * *' [210 U.S. at page 386, 28 S.Ct. at page 714, 52 L. Ed. 1103]" (Emphasis supplied).

From the quotation within the above quotation from the case of *Londoner v. Denver*, 210 U.S. 373, it is clear that the United States Supreme Court considers the argument an essential part of any hearing or trial and, the failure on the part of the court in

this instance to allow argument, denied both sides a fair trial. As stated on page 807 of the above in *Wilson v. Federal Communications Commission*, "*He who decides anything, one party being unheard, though he should decide right, does wrong.*" (Emphasis supplied). It may be said with equal force that he who decides a matter with both parties being unheard does doubly wrong.

The United States Supreme Court has spoken very clearly upon this subject in the case of *Morgan v. United States*, 298 U.S. 468, wherein the following is stated:

> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The *'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence*

or argument, it is manifest that the hearing has not been given." (Emphasis supplied).

It will be noted in the above quotation that the Supreme Court refers to a "hearing". Authorities will be set out herein which clearly show that a hearing and a trial are one and the same thing.

The Supreme Court again spoke on this subject in the case of *Morgan v. United States*, 304 U.S. 1, where on pages 14 and 15 the following language is found:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *These demand 'a fair and open hearing,' — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'.*" (Emphasis supplied).

As indicated by the above language, when an executive branch of the Government has been given the right to make administrative determinations, such proceedings are quasi-judicial in character and the parties interested therein must be protected by

rudimentary requirements of fair play. Since the United States Supreme Court has determined that administrative hearings should be conducted with the same principle of "fair play" as a judicial hearing, then it is elementary that if it is wrong for an administrative decision to be made without argument, it is likewise wrong for a judicial decision to be made without argument. On page 18 of the above-mentioned decision the United States Supreme Court states as follows:

> "But a 'full hearing' — a fair and open hearing — requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit *argument* implies that opportunity; otherwise the right may be but a barren one." (Emphasis supplied).

As noted in the above quotation, the Supreme Court considers the right to make an argument an essential part of a fair and open trial. The Court in this instance by failing to allow counsel for the parties to argue, has denied the defendant in particular one of the essential elements of a fair trial.

This principle is made increasingly clear in the language used on page 20 of the above decision as follows:

"The requirements of fairness are not exhausted

in the taking or consideration of evidence but extend to the *concluding parts* of the procedure as well as to the beginning and intermediate steps." (Emphasis supplied).

In the case of *State v. Milhollan*, 50 N.D. 184, 195, N.W. 290, the following is stated:

"The word 'hearing' contemplates an opportunity to be heard. That is, not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and *argument.*" (Emphasis supplied).

In *State v. City of Milwaukee*, 157 Wis. 505, 147 N.W. 50, the following was stated:

"The repeated refusal of the common council to grant either the written or oral request of the relator to hear his counsel before acting upon the report of the committee stands upon a different basis. There are at least three substantial elements of a common-law hearing: (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) *the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto.* If either of these rights are denied a party, he does not have the substantials of a common-law hearing. *Ekern v. McGovern*, 154 Wis. 157, 277, 142 N.W. 595, 46 L.R.A. (N.S.) 796 et seq., and cases cited. That *the word 'hearing' includes 'oral argument'* is expressly ruled by the following cases: *Miller v. Tobin* (C.C.) 18 Fed. 609, 616; *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 763, 57 C.C.A. 64; *Merritt v. Portchester*, 8 Hun. (N.Y.) 40,

45; *Babcock v. Wolf*, 70 Iowa, 676, 679, 28 N.W. 490. See, also *Akerly v. Vilas*, 24 Wis. 165 171, 1 Am. Rep. 166. Indeed the idea of the right of a person to be heard by himself or counsel when his property or his personal rights are questioned was so early and firmly imbedded into the groundwork of our jurisprudence that it is difficut to find instances where it has been challenged even in quasi-judicial proceedings. The importance and value of such right is considerable in nearly every case. *It is the office of counsel to marshal the facts proven to point out their relative importance, and to interpret them in the light of the law applicable thereto. When this is properly done, the judicial mind is enlightened, and is in condition to decide the questions* presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent, when it is born in mind that the evidence taken by the committee was very voluminous, was read to the common council at a number of different sessions separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel *to argue* the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. *That the denial of such a right was prejudicial follows from what has been said.*" (Emphasis supplied).

The trial judge in the instance case was never enlightened by argument. The fact that the Appellee's version of the accident is absurd and incredible was never made known to the trial judge. Therefore, this Court having had the benefit of the argu-

ment of counsel is in a better position to make findings of fact than the trial judge.

Since the Supreme Court in the two Morgan cases above cited has announced the law of the land that the argument is an essential part of a fair trial, it was error for the trial Court to decide a matter without hearing argument. In *In Re Galvin's Estate*, 274 N.Y.S. 846, the following is stated:

> "Each of the Constitutions guarantees to the citizen and only to him — not to any court — the privilege of saying whether or not he will be aggrieved by the proposed action of any court. This makes indispensable some preliminary notice, either actual or its presumptive equivalent, before the court acts; but the privilege not having been extended to the court, it cannot presume, or assume beforehand, without notice, what the citizen might or might not do were he notified. From this viewpoint of constitutional law, it is immaterial that in the judgment of the court he could not possibly be aggrieved by its proposed decree. The right is *his and his alone* to be judge of that before any court passes on it. It is a condition precedent to any court acting that the citizen shall have first had preliminary notice in one or other of the traditional forms, and *an opportunity to be heard.*" (Emphasis supplied).

It is the Appellant's contention that one of the principal functions of an argument is to give the respective parties an opportunity to advise the Court of their contentions as to the inferences which should be drawn from the evidence. If this opportunity had

been given the Appellant in this instance it could have conclusively proved to the Court that it would be physically impossible for the Appellee to have slipped from her seat to the floor of the bus in the manner described by her.

The Appellant could not point out the inferences to be drawn from each bit of testimony as it was presented. The time to present inferences and conclusions to be drawn from the testimony comes when counsel is permitted to argue. The Court, having denied the Appellant the right to argue, has denied the Appellant the right to point out the inferences and conclusions which should properly be drawn from the evidence.

Counsel, in properly preparing a case, must of necessity carefully weigh the evidence which will be presented. In the process of such preparation, counsel spends many days and weeks and sometimes months in considering the reasonable and logical inferences and conclusions to be drawn from the evidence. This thought process cannot be accomplished in a few seconds. The Court having heard the evidence is not in a position to give due consideration to such evidence unless he, too, carefully considers and deliberates upon the same in the same manner which counsel have done in the preparation of their cases. The two or three sec-

onds within which the Court announced its decision at the conclusion of the evidence in this case, clearly shows that the Court could not have gone through this mental process. Had the Court listened to arguments presented by counsel, the Court would have had the benefit of all of the thought processes which had gone into the preparation of this case by counsel on both sides. By failing to give counsel this opportunity, the Court has denied both sides, and the Appellant in particular, the right to be heard. For decisions holding squarely that a hearing and a trial are one and the same thing, see *Miller v. Tobin*, 18 Fed. 609, and *Joseph Dry Goods Co. v. Hecht.* 120 Fed. 760.

The Court could not cure the error of announcing its decision without argument by thereafter allowing the Appellant to submit a memorandum of authorities. If the Court had changed its decision after considering the memorandum of authorities, then Appellee would have been denied the right to argue the matter and could have rightly claimed that she had not been given a fair trial. The Court having once expressed its opinion, the error was then and there committed and could in no wise be cured. If a juror should express his opinion prior to the argument of a case the Court would no doubt dismiss that juror without any hesitancy since it would be unfair to

argue to a biased juror. In this case the equivalent of the entire jury panel expressed its opinion before argument. It is equally unfair for counsel to have to argue to a Court which has already made a determination without benefit of argument. As the decisions above quoted have stated, a "full hearing" or, in other words, a trial, requires argument before the decision is made and not afterwards.

Argument On Specification of Error No. X

Argument

The Appellant called as a witness Mr. Harold R. Barton, who was the superintendent of the Vashon Schools at Vashon Island. Mr. Barton testified that he had occasion to observe the Appellee approximately once a week from November, 1948, to June of 1949, and that he did not observe anything that would indicate that she had any physical disability.

Further, the question was asked of the witness "Will you state whether or not you recall submitting a report to the Seattle School District on Esther Westfall's qualifications sometime in 1949?"

To this question opposing counsel made the following objection: "If your Honor, please, I object to this type of evidence being brought out. I can't see where it has any bearing." The Court sustained the

objection, whereupon counsel for the Appellant advised the Court: "My question is preliminary, your Honor. I believe it would be competent for him to testify what he put in that report in regard to her physical ability and that was my purpose." The Court again sustained the objection.

The Appellant contends that it was error for the Court to exclude this evidence. Certainly reports written by the Appellee's employer which would include statements as to her physical ability are competent evidence. The testimony of this witness would be far more competent and convincing if the Appellant were allowed to show that the same information was contained in a report made by the witness at a time when his memory and knowledge of the facts were fresh in his mind and, further, that the report was made at a time when no litigation was pending.

The evidence excluded by the Court has a material bearing upon the extent of the Appellee's damages. The Appellee testified, and apparently convinced the Court, that she was permanently disabled. The Appellant should have the right to refute this evidence and the trial judge in denying the Appellant that right has denied the Appellant a fair trial.

CONCLUSION

The Appellant has shown herein that the Appellee's cause of action was barred by the statute of limitations of the State of Washington, and that since the Appellant's agent could not be sued by virtue of such statute of limitations, the Appellant can not be sued. Further, the Appellant has shown this Honorable Court that the Appellee's cause of action is further barred by the doctrine of laches.

The Guest statute of the State of Washington and the decisions rendered by the Supreme Court of the State of Washington upon such statute clearly show that under the laws of that state the Appellee has no right to recover.

As shown in this brief, the Appellee has presented no evidence entitling her to recover special damages in any amount, nor has she shown any evidence which would entitle her to recover general damages in the sum of $7500.00. Even if this Court should find liability on behalf of the Appellant, the amount of the general damages should be reduced to not more than $1000.00.

As further shown in this brief, the evidence clearly shows that there was no negligence on the part of Appellant's driver, but on the contrary the Appellee was guilty of contributory negligence.

The trial court having refused to allow counsel to argue the case, has denied the Appellant a fair trial, and if for no other reason this cause should be remanded for a new trial on this ground.

Having thus pointed out the errors committed by the trial judge, the Appellant respectfully requests this Court to reverse the decision of the trial court and order the entry of a judgment for the Appellant. In the event this Court does not find it proper to reverse the decision of the trial judge, then, at least, this case should be remanded to the district court for a new trial.

Respectfully submitted,

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